

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-1592

To be argued by
W. CULLEN MACDONALD

BJS

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1592

UNITED STATES OF AMERICA,

Appellee,

—v.—

HARRY HOFFER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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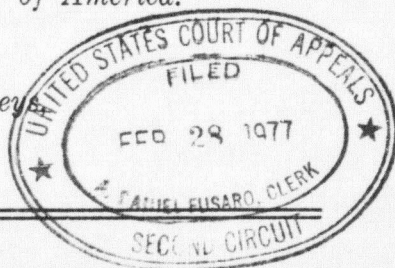


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UNITED STATES OF AMERICA,

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—v.—

HARRY HOFFER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Harry Hoffer appeals from the denial, on December 8, 1976, by the Honorable Milton Pollack, United States District Judge, without a hearing, of his motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure on the grounds of denial of the effective assistance of counsel and newly discovered evidence.

Indictment 72 Cr. 1365, in sixteen counts, was filed on December 21, 1972. Count One charged Hoffer and five co-defendants with conspiring to violate Sections 1341-1343 and 2314 of Title 18, United States Code, in violation of Section 371 of Title 18, United States Code. Counts Two through Five charged Hoffer and his co-defendants with the unlawful transportation of two certified checks totaling \$1,140,000 in interstate and foreign commerce knowing the same to have been "stolen, con-

verted and taken by fraud" in violation of Section 2314 of Title 18, United States Code. Counts Six and Seven charged Hoffer and his co-defendants with the unlawful use of names in the carrying out of a scheme and artifice to defraud in violation of Section 1342 of Title 18, United States Code. Similarly, Counts Eight through Sixteen charged Hoffer and his co-defendants with the unlawful use of the mails and wire communication facilities in interstate and foreign commerce in violation of Sections 1341 and 1343, of Title 18, United States Code.

Trial commenced as to Hoffer and three of his co-defendants, John Joseph Frank, Alfred J. Hemlock and Stephen Borgman a/k/a Stephen Berman, a/k/a Steve Miller on June 4, 1973.* The trial concluded on June 8, 1973 with guilty verdicts as to each defendant on some but not all of the Counts then remaining.** Hoffer was found guilty on nine counts: mail fraud (Counts 12 and 13); using fictitious names in carrying out the mail fraud scheme (Counts 6 and 7); interstate and foreign transportation of fraudulently obtained checks (Counts 2 through 5), and conspiracy to violate the foregoing (Count 1).

On September 11, 1973, Hoffer was sentenced to concurrent two-year terms of imprisonment on Counts One through Seven, and a one-year term of imprisonment on Counts Twelve and Thirteen, to run concurrently with each other but consecutively to the sentences on Counts One through Seven. Hoffer's sentence was later reduced to a total of eighteen months imprisonment.***

* Co-defendants A. Arthur Kay and Maurice S. Hebert were and remain fugitives.

** At the close of the case, Counts Eight and Eleven had been dismissed with, and Count Sixteen without, the Government's consent.

*** Hoffer commenced service of his sentence on September 17, 1975 and was released on parole on June 9, 1976.

Hoffer's original appeal was heard by a panel of this Court (Friendly, Hays and Oakes, *C.J.J.*), and, on February 25, 1974, the panel filed an opinion affirming Hoffer's conviction. *United States v. Frank*, 494 F.2d 145 (2d Cir. 1974). On April 11, 1974, this Court denied Hoffer's petition for rehearing, with suggestion for rehearing *en banc*. On October 14, 1974, the United States Supreme Court denied Hoffer's petition for a writ of *certiorari*. *Hoffer v. United States*, 419 U.S. 828 (1974).

On October 13, 1976, one day short of the two-year limitation period under Federal Rule of Criminal Procedure 33, Hoffer filed his motion for a new trial alleging: (1) that his trial attorney had provided ineffective assistance of counsel; and (2) that he had obtained certain documents which constituted newly discovered evidence and demonstrated his innocence. Judge Pollack denied Hoffer's motion in a written opinion on December 8, 1976. Judge Pollack's opinion is reproduced in the current appendix (App. 312-16)* and is also reported. *United States v. Hoffer*, 423 F. Supp. 811 (S.D.N.Y. 1976).

Statement of Facts

An understanding of the facts material to Hoffer's conviction is essential to a full comprehension of his present claims. We are unable to improve on Judge Friendly's recitation of the facts in his opinion affirming Hoffer's conviction, and accordingly, Judge Friendly's fac-

* "App." refers to Hoffer's present appendix; "Appeal App." refers to Hoffer's appendix on his original appeal from his conviction; "Government's Appeal App." refers to the Government's appendix submitted in the original appeals; and "Br." refers to the appellant's current brief.

tual statement follows supplemented only by the bracketed insertions of those additional facts which have surfaced since the trial or were originally omitted from the statement of facts in the interest of brevity.

A. Judge Friendly's Statement of Facts

"The case concerns a fraud allegedly perpetrated on Mrs. Marie Dominguez, the then 28-year-old daughter of former President Rafael Trujillo of the Dominican Republic. Since appellants all challenge the sufficiency of the evidence to warrant submission to the jury, it is necessary to summarize the evidence presented against each defendant. Taken in a light favorable to the Government the facts are as follows:

In the summer of 1967, Mrs. DeLeon, as Mrs. Dominguez then was, left her husband's home in Madrid and came to this country with two of her children. Apparently because her property was the subject of confiscation decrees by the Dominican government, she had placed it in the name of a number of corporations in countries with bank secrecy laws. One of these, a Luxembourg corporation called Planinvest, held a \$2.4 million certificate of deposit in the London offices of the Bank of London and South America.

When she arrived in this country, Mrs. Dominguez was met at the airport by defendant John Joseph Frank, an attorney with an office in Washington, D.C., and a former agent with the F.B.I. and the C.I.A. Mrs. Dominguez' husband had engaged Frank to obtain an entry visa for her, apparently because he had provided security services for the Trujillo family in the past. Frank was accompanied by defendant Borgman, whom he introduced as "Steve Miller," the name we shall also use.

Shortly thereafter, Frank and Miller introduced Mrs. Dominguez to defendant Hemlock, a New York attorney with whom defendant Hoffer was associated. Hemlock agreed to participate in a ruse for the benefit of Mrs. Dominguez whereby, under the pretext of a business negotiation, he would divert her previous husband, Mr. DeLeon, from Madrid to Barcelona, while she took possession of certain of her belongings in the family home in Madrid. The plan succeeded. In September Hemlock and Hoffer began to advise Mrs. Dominguez on a property settlement with her husband, from whom, with the aid of Frank and Miller, she had obtained a Mexican divorce. In the course of this, they learned of Planinvest. Hemlock and Mrs. Dominguez instructed the London bank to transmit interest payments to her personal account at the Bank of New York and to send all communications relating to the Planinvest account "in care of Hemlock, List, Hoffer & Becker, Esqs." at their New York office. In October, on the advice of Frank and Miller, she opened a second account, at the New York branch of the Bank of London and South America. That account was opened in the name of Planinvest, "c/o John J. Frank, 1500 Massachusetts Avenue, Washington, D.C." Mrs. Dominguez signed one signature card for the account, and Frank and Miller signed a second card to enable them to request statements, deposit slips, checks or a balance relating to the account.* During the fall of 1967, Frank and Miller largely took over the conduct of Mrs. Dominguez' day-to-day financial affairs. They had custody of her checkbook, they prepared batches of checks for her signature, and they cashed checks for her at the banks.

* On the Government's theory of the case, this account served no purpose save as a vehicle for subsequent frauds.

Sometime during that fall, Frank and Miller began to recommend that Mrs. Dominguez invest in foreign land, avowedly to avoid loss in the devaluation of the dollar—advice that proved to be wise, although premature—and to avoid high United States taxes. After an adverse reaction from Mrs. Dominguez' brother, Frank and Miller returned to the charge with a recommendation specifically suggesting that she buy Canadian land. According to Mrs. Dominguez, Miller insisted that Canada was booming and that a land purchase there "would be a wonderful investment." Mrs. Dominguez agreed to consider any specific property that they might suggest, but specified that in no event was she willing to spend more than \$200,000.

Mrs. Dominguez' limited acquiescence provided an entry for the Canadian land manipulations through which the fraud was sprung. On January 9, 1968, a Dr. George C. Hori sold a parcel of land in the northeastern part of Montreal [which had been located by Hemlock and Hoffer during their several trips to Montreal "to find suitable real estate for the plan, to set up the needed personnel, legal and real estate and to arrange the transactions." (*United States v. Hoffer*, 423 F. Supp. 811, 817 (S.D.N.Y. 1976); App. 329)]. The price of the land was \$79,000, of which \$22,000 was to be paid him in cash and the balance was to be used to clear existing mortgages. The deed, executed in the office of a notary, Maitre Elie Solomon, named as the purchaser A. Arthur Kay, one of the two unarrested co-defendants named in the indictment. The parties instructed the notary to hold the deed pending payment into his trust account for disbursement to Dr. Hori and the mortgagees. The notary asked Kay for the names of the Bahamian company to which Kay was planning to resell the land and of the European company to which it would be resold again; Kay said the information would come in a call from New

York. Several hours later, Mtre. Solomon received such a call; he was not sure whether it was from Hoffer or Hemlock.* The caller said the first name of the Bahamian corporation was "Columbia"; the rest of the information would be supplied the next day in the Bahamas. The notary in turn requested that the caller procure a resolution from the ultimate purchaser authorizing the purchase. He dictated a proposed resolution that would meet the requirements for effecting the transfer.

On January 10, Mtre. Solomon, Kay, co-defendant Maurice S. Hebert, and an attorney, Irving L. Adessky, flew from Montreal to Kennedy Airport in New York City. At the same time Miller had the New York branch of the Bank of London and South America certify a Planinvest check for \$778,500 to Columbia Corporation Ltd.** Hemlock, inferably with the check in hand, joined the Montreal party at the airport, whence they flew to the Bahamas, where Hoffer was awaiting them. [In the meantime, Hoffer had previously arranged the procurement of two 'inactive' Nassau corporate set-ups, Columbia and Splindian (the names of the dummy corporations), had his co-defendants named as the stockholders,

* Solomon testified on direct examination that the call from New York had come from "a gentleman who identified himself as Mr. Harry Hoffer." The court subsequently struck out his direct testimony concerning the telephone call for lack of foundation, but counsel for Hoffer on cross-examination elicited from Solomon that before the grand jury he had testified that he had received a call from "either Mr. Hemlock or a member of his firm."

** The check is signed in the name of Angelita De Leon (the name Mrs. Dominguez used during her first marriage), as President of Planinvest; the Government did not dispute that the signature was hers. The basis for the certification was a telexed transfer of \$780,000 from the main office in London. The record is silent on who directed the transfer.

directors and officers, and had himself appointed Assistant Secretary so that he could handle things in Nassau. In addition, Hoffer opened demand deposit or checking accounts for Columbia and Splindian over which he was the sole authorized signator (*United States v. Hoffer, supra*, 423 F. Supp. at 817; App. 329-30)].

The next day the entire group met with a Bahamian attorney, Anthony Hepburn, and his secretary, Celia Neill. Kay signed a deed transferring the property to Columbia, which was represented by Hepburn and Neill, its vice-president and assistant secretary. The further transfer from Columbia to Planinvest was delayed because neither Hemlock nor Hoffer had brought a Planinvest resolution authorizing anyone to execute the deed of purchase. While the group was waiting for the arrival of the resolution, Hoffer, in Hemlock's presence, informed Mtre. Solomon that Planinvest would be represented by one Herbert M. Lefkowitz as agent but that the deed should refer to Planinvest in care of Frank at his Washington, D.C. office; Hoffer also promised to send Solomon certified copies of the charters of Columbia and Planinvest.

A man identified as Lefkowitz appeared at around 1:30 p.m. He produced a resolution which the notary said was substantially what he had dictated to either Hoffer or Hemlock in their telephone conversation two days before. The resolution recited that at a meeting in New York on January 9, Planinvest had authorized the purchase of the property from Columbia for \$1.00 and other good and valuable consideration and had designated Lefkowitz to sign the deed; the document purported to be certified by Mrs. DeLeon as President and Secretary. The notary thereupon authorized execution of the deed from Columbia to Planinvest. However, since he had

not received the \$79,000 required to clear the initial transaction, the notary refused to release the certified copy of the deed from Columbia to Planinvest. The meeting then adjourned pending the arrival of the funds.

During the same day, January 11, Hemlock and Hoffer met with the Nassau branch manager of the First National City Bank (FNCB), Michael Latvis. They opened [three time deposit] accounts for Columbia [designated Columbia A, Columbia B, Columbia C.] [Hoffer had previously opened a checking account] for Splindian Investments Limited, another Bahamian corporation. The [se three time deposit] accounts provided that [separate] withdrawals could be made only with the [separate, individual] authorization[s] of Hemlock, [Miller instead of] Hoffer, and Frank. Hemlock and [apparently not Hoffer] signed the signature card [for his Columbia time deposit account] card at that time; Frank's signature [and apparently Miller's as well] was obtained later. Hemlock and Hoffer then presented the \$778,500 check from Planinvest to Columbia and arranged for a portion of this to be kept [until transfer] in[to] a time deposit * [for Hemlock, Miller and Frank as indicated]. Notwithstanding the certification, FNCB would not extend immediate credit until the check had been accepted for clearance at the Federal Reserve Bank at New York, a procedure which would normally take eight days. Hoffer and Hemlock suggested the dispatch of a messenger to expedite clearance of the check. Latvis, secretary, Miss Elizabeth Reilly, volunteered for the trip, for which Hoffer and Hemlock made the arrangements.

* Latvis testified that time deposits were available on a 30- and 90-day basis and that to the best of his memory, the deposits in question were placed on a 90-day basis.

Miss Reilly presented the check for processing at FNCB in New York around 10:30 a.m. on July 12. That same morning Hemlock, Hoffer, Kay and Hebert met with the notary and Adessky in Nassau; either Hemlock or Hoffer gave Adessky and the notary \$500 apiece [in cash but drawn by Hoffer from Columbia's checking account] as compensation for their services. [In addition, Hoffer signed additional checks, altogether aggregating \$133,500 in disbursements to Kay and Hebert for their shares as well as Hori's purchase price. He then signed and transferred approximately \$215,000 into each of the three Columbia time deposit accounts. (App. 131)]. The two lawyers then left for New York. Later Kay took the notary to the Nassau branch of FNCB, where the transfer of \$79,000 to the notary's trust account in Montreal was arranged. The notary flew the next day to New York; by prearrangement Hoffer met him at the airport and received a "special copy" of the deed from Columbia to Planinvest.* On January 15 Hoffer sent Solomon a copy of Columbia's charter, showing it had been incorporated on November 27, 1967.

Shortly thereafter, Miller told Mrs. Dominguez she had purchased land in Canada. After she protested that she had authorized only inquiry and not action, Frank came into the room. Miller asked if she remembered signing "the check"; she did not. Frank then advised her not to worry and assured her that "everything is all right." In answer to a question concerning the cost of the property, he answered that it was "within the limits" she had previously set. Sometime later, Miller showed her some clippings from U.S. News & World Report and the Wall Street Journal that reported new mineral explora-

* The "special copy" differed from the deed that was delivered in that it did not contain a copy of the resolution but merely referred to a duly authorized resolution.

tions in various parts of Quebec. Miller told her that the discoveries had already caused her tract of marshy, swampy land near Montreal to appreciate.

About a week after the first transaction, Kay inquired whether the notary would be interested in arranging for the sale of some 150,000 square feet of a farm owned by a corporation in which the notary held a minority interest, for no more than \$8,000. When Solomon expressed reluctance to proceed with the transaction before hearing from Hemlock or Hoffer, Kay paid him \$500 to cover the notarial fees and the preliminary costs of subdivision. The notary thereupon began making arrangements for the sale.

Kay subsequently told the notary that the scenario for the second transaction would resemble that for the first, save for a few changes in names. This time Denise Comeau would take Kay's place as the first purchaser and Splindian, whose charter he delivered to the notary, would be the second. Meanwhile, Mtre. Solomon received a copy of the Planinvest charter from Hoffer; he was disturbed to discover that Planinvest was not expressly empowered to buy and sell land as required by Canadian law, and asked for a copy of the Luxembourg laws that might aid in implying the requisite power. Hoffer never supplied the Luxembourg statutes or any other proof that Planinvest could engage in Canadian real estate transactions.

Miller told Mrs. Dominguez around this time that a very good piece of land in Canada was being sold for tax reasons at less than its worth. She at first demurred, saying that she was unwilling to buy any more land in Canada. Miller then telephoned Frank in her presence and said, "John, she doesn't want to buy the land." After that conversation, Miller once again urged her to consent to the purchase. Finally, she agreed to consider

the land, but she insisted that Miller first send a letter to the Bank of London and South America requesting three different bank appraisals. Miller typed the letter as instructed, but Mrs. Dominguez testified that she never received any response from the bank.

On February 2, 1968 Miller presented to the New York branch of the Bank of London and South America a Plaininvest check in favor of Splindian in the sum of \$361,500, which the bank certified in consequence of a prior transfer of that sum from London. Two days later the notary, Adessky, Kay and Denise Comeau flew to New York. Hemlock joined them, inferably with the certified check in hand, and the group flew on to Nassau where Hoffer was awaiting them.

The following morning the group met with Hepburn, Miss Neill and Lefkowitz for the second closing. The deeds from Solomon's corporation to Miss Comeau and from her to Splindian, acting through Hepburn and Neill, were promptly executed. Although Hoffer supplied no evidence that Planinvest was empowered to purchase foreign real estate, as the notary had requested, the deed from Splindian was executed by Hepburn and Neill, and accepted to Planinvest by Lefkowitz. Hemlock and Hoffer went on to the FNCB [to make the initial deposit into Splindian's checking account before disbursing \$200,000 to Comeau and \$11,000 to Adessky and Solomon, and then] made [the arrangements for dividing the balance into] a [pair of \$75,000] time deposit[s] in Splindian's account [denominated Splindian A and Splindian B, under the separate, individual signature control of Hemlock and Miller], and arranged for Miss Reilly to make another trip to New York to expedite the clearance of the Planinvest check. Shortly thereafter Kay paid Solomon \$10,856 for the land; \$2,856 of this was rebated to Kay upon their return to Montreal.

In February or March, 1968, Arcadio Santana, a former family accountant, left the employ of Mrs. Dominguez' former husband and joined her in New York. She asked him to ascertain from Frank and Miller the precise amount of money that Planinvest had spent on the one acquisition of which she was then aware. Apparently Santana learned that \$778,000 had been paid; when Mrs. Dominguez taxed Frank with this, she once again urged her not to worry and assured her that it was "a good piece of land" and that it was worth the price she had paid for it. Shortly thereafter, Hemlock, Hoffer and Frank went to the FNCB in Nassau and asked Latvis to break the time deposits and pay them out in cash, which he did. Since the bank records were not available at the trial because of the Bahamian bank secrecy laws, he could testify only that they withdrew "a large amount, perhaps from 300 to \$600,000, \$300,000 to \$600,000." Also during March, 1968, Frank gave Mrs. Dominguez the special copy of the deed to the Hori tract, see note 7; when she asked him to explain the nominal consideration of one dollar, he called in Miller, who told her that such recitations were usual in Canada.

Unsatisfied with Frank's explanation of the large expenditure, Mrs. Dominguez and her new husband met with Hemlock that June at her home in Queens. The couple gave Hemlock the special copy of the deed and requested that he investigate the transaction. Mrs. Dominguez testified that she thought Hoffer was present at that meeting

but could not be certain.* Further meetings were held through the summer, primarily for the purpose of discussing Mrs. Dominguez' tax returns which were being prepared by a tax specialist recommended by Hemlock and Hoffer. At one meeting Mrs. Dominguez expressed concern about the Canadian property being in the name of Planinvest, which she thought was not supposed to own land directly. Neither Hoffer nor Hemlock revealed their previous exposure to this problem or the purchase from Maitre Solomon. As time passed without the receipt of a report on the initial purchase from Hemlock and Hoffer, Mrs. Dominguez dispatched Santana to Montreal. Early in September, 1968, at a meeting attended by Hemlock, Hoffer and others, she told Hemlock she had learned that he had been in Canada several times making arrangements for the purchase of the lot; he replied "I smell a rat" and "I think somebody has been using my name," ** but did not reveal what he in fact knew. She also told Hemlock she had been informed that the lot wasn't worth what was paid for it; Hemlock responded by proposing to set up a meeting with Frank and Miller.

This meeting occurred on September 24 at Hemlock's office. Its first phase was attended by Mrs. Dominguez, Frank, Miller and Hemlock. *** This time Frank and Miller

* Mrs. Dominguez testified that although she could not recall which of the summer meetings Hoffer attended, she was certain that he had been at most of them.

** The record contains no evidence that Hemlock had made such trips.

*** Hemlock had endeavored to persuade Mrs. Dominguez to come without her husband. After this failed, he did prevail on the husband to wait outside his office.

admitted that the land was not worth what had been paid, but they explained that the difference had been used to pay off the C.I.A. because she had been involved in activities to kill one of her father's assassins. Miller and Frank then left. Mr. Dominguez entered and Hemlock repeated what they had said. In the course of the meeting, Hemlock told Mr. and Mrs. Dominguez nothing about the many other circumstances of the two transactions of which he was aware. Subsequently, Mrs. Dominguez obtained other counsel who began a civil action on her behalf in the District Court for the Southern District of New York against Frank, Miller and Hemlock."

[On December 31, 1968, Hoffer who had been an associate of Hemlock's firm was given by Hemlock a 15% share in net profits of Hemlock's firm without any responsibility for the losses. (App. 42).]

B. Judge Friendly's Further Discussion of the Sufficiency of the Evidence

Judge Friendly's discussion of the sufficiency of the evidence against Hoffer is also illuminating:

"Hemlock and Hoffer claim that the evidence is consistent with their having simply engaged in professional activities and that any wrongdoing was solely Frank's and Miller's. Hoffer makes the further argument that he was acting in a subordinate capacity and thus was even farther than Hemlock from the odoriferous stream of guilty knowledge. But too many red flags were flying to make these contentions plausible. It is useful to recall Judge Learned Hand's observation that 'the cumulation of instances, each explicable only by extreme credulity or professional inexpertness, may have a probative force immensely greater

than any one of them alone.' *United States v. White*, 124 F.2d 181, 185 (2d Cir. 1941). We repeat also that lawyers cannot 'escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen,' *United States v. Benjamin*, 328 F.2d 854, 863 (2d Cir.), *cert. denied*, 377 U.S. 953 (1964). See also *United States v. Sarantos*, 455 F.2d 877, 880-82 (2d Cir. 1972), and cases there cited. If Hemlock and Hoffer were acting as attorneys, their client was Planinvest, which they knew to be simply Mrs. Dominguez in an incorporated form. Yet there is no indication that they ever advised her about the seemingly needless interposition of Columbia and Splindiar, that they ever made the slightest inquiry concerning the relationship between the large Planinvest certified checks and the modest price which they knew was paid to the Canadian owners, or that they ever notified Mrs. Dominguez that the second transaction had occurred at all. Perhaps the most damaging evidence against them was their personal participation with Frank in the breaking of the time deposit just after Frank had learned that the jig might be beginning to be up. Whether or not they received any portion of the proceeds, they had beheld Frank walking out of the FNCB in Nassau with \$300,000 to \$600,000 in cash generated by the Planinvest checks to Columbia and Splindian. Six months later, and three months after Mrs. Dominguez had instructed them to investigate the first transaction, they had revealed nothing. Their silence throughout the summer, in light of their intimate familiarity with many of the details of the two purchases, makes their claim of innocence highly implausible. Hemlock's efforts to prevent

Mr. Dominguez from attending the showdown on September 23 and his bland reaction to a revelation by Frank and Miller that would have caused an honest lawyer to erupt in fury are the final straws as far as he is concerned."

C. The Proceedings on Hoffer's Motion for a New Trial

Hoffer's motion for a new trial is premised on two claims: (1) that his trial attorney's fees were paid for by a co-defendant and that his attorney inadequately cross-examined certain witnesses and advised Hoffer not to testify in his own behalf simply to protect the interests of Hoffer's co-defendant; and (2) that Hoffer had, after the trial, obtained an acknowledgment from the Nassau bank in which the spoils of the fraud had been deposited that Hoffer was not authorized to draw on the time accounts.

Judge Pollack rejected the first claim on the following grounds: (i) the record of the trial demonstrated that Hoffer's trial counsel, James La Rossa, conducted "aggressive, incisive and very competent and thorough cross-examinations of the Government's witnesses"; (ii) the fact that La Rossa's fees had been paid by a co-defendant did not demonstrate a conflict, and most certainly Hoffer was aware of the fee arrangements; (iii) the claim that La Rossa's advice to Hoffer not to take the stand was based on a corrupt motive had no factual support; (iv) in any event, Hoffer, as an attorney, voluntarily and knowingly decided to forego testifying and no claim was made that La Rossa coerced Hoffer into declining to testify; and (v) based on an examination of Hoffer's later testimony before the Bar Association during disciplinary proceedings, it was clear that if he had testified at trial, his testimony would not have aided him or produced a different verdict.

Hoffer's second claim was also rejected on multiple grounds: (i) the evidence concerning the foreign accounts was not newly discovered after trial, since Hoffer had made all the arrangements for the opening of the accounts, and (ii) in light of all the other evidence of Hoffer's participation in this fraud, proof that he was not authorized to draw on the time-accounts would have been inconsequential and would not have produced a different verdict.

ARGUMENT

POINT I

Judge Pollack Correctly Determined That Hoffer Had Not Made a Sufficient Showing of Ineffective Assistance of Counsel to Require a Hearing.

Hoffer argues that he was entitled to a hearing on his claim that his counsel's advice concerning whether or not Hoffer should have testified at trial was improperly influenced and controlled by his co-defendant Hemlock. More specifically, Hoffer contends that the affidavits he supplied from his co-defendants Frank and Berman establish that Hoffer's attorney advised Hoffer not to testify, because truthful testimony from Hoffer would have contributed to the convictions of Hoffer's co-defendants. On the contrary, Judge Pollack correctly determined that Frank's and Berman's affidavits were insufficient to create any factual issue, particularly in light of the trial record demonstrating that Hoffer's attorney had performed highly competently and letters written by Berman after submission of his affidavit making clear that he had no information that Hoffer's attorney had betrayed his client's interests.

Hoffer correctly recites the well-settled legal principle that, where a petitioner's affidavits contain sufficient

evidentiary matter to support a claim for a new trial, the District Court may not deny relief without a hearing, unless the files and records of the case show the petitioner is not entitled to relief. (Br. at 13). See, e.g., *Machibroda v. United States*, 368 U.S. 487 (1962); *Taylor v. United States*, 487 F.2d 307 (2d Cir. 1973). This established principle, however, does not require a hearing where the allegations contained in the petitioner's affidavits themselves (i) disclose the inadequacies of the petitioner's claim and (ii) contain matters which would not be admissible or competent at a hearing, such as hearsay. See *United States v. Johnson*, 327 U.S. 106 (1946); *United States v. Mamone*, 543 F.2d 457 (2d Cir. 1976); *United States v. Franzese*, 525 F.2d 27, 31 (2d Cir. 1975); *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975); *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974); *United States v. Catalano*, 491 F.2d 268 (2d Cir.), *cert. denied*, 419 U.S. 825 (1974); *D'Ercole v. United States*, 361 F.2d 211, 212 (2d Cir.), *cert. denied*, 385 U.S. 995 (1966). Moreover, it is equally settled that affidavits from the Government can be considered in assessing the sufficiency of petitioner's supporting affidavits, *United States v. Franzese*, *supra*, 525 F.2d at 31; *Dalli v. United States*, *supra*, 491 F.2d at 762 n.4, particularly insofar as the Government's affidavits show what allegations of the petitioner are not deemed admitted by the Government. *United States v. Salerno*, 290 F.2d 105, 106 (2d Cir. 1961).

With an understanding of these legal principles in mind, it is clear that Judge Pollack did not err in rejecting Hoffer's claim without a hearing. The relevant facts are as follows:

Hoffer's affidavit submitted in support of his motion stated that Hemlock, Hoffer's co-defendant, agreed to pay the legal fee of Hoffer's attorney, James LaRossa. (App.

26-27).^{*} Next, Hoffer's affidavit recited discussions with LaRossa as to whether or not Hoffer should testify, culminating in the "strongly stated opinion" that he should not testify. (App. 28). Finally, Hoffer described how, while he was incarcerated with his co-defendants Frank and Berman, he learned from them the information set forth in the affidavits which they signed for him. (App. 29-30).^{**}

^{*} Hoffer's affidavit also contained his conclusion that La Rossa's true "interest [was] in helping Alfred Hemlock in his defense." (App. 31). The District Judge correctly disregarded this self-serving conclusory statement in assessing the adequacy of Hoffer's claim for a hearing.

^{**} Hoffer in his affidavit had originally included three additional claims which he does not press here, and wisely so. First, the claim that Hoffer was prevented from presenting the testimony of Becker, his law partner, "that Hoffer acted [simply] as an employee of Hemlock" (App. 60), was and is more than adequately met by citation to the trial record where Becker actually testified that "Hoffer was an employee." (Appeal App. 613). Second, the similar claim with respect to a witness named Blumberg was equally inexplicable in light of the fact that no affidavit from Blumenberg was submitted to set forth the substance of his testimony, thus making it impossible for Judge Pollack or this Court to assess whether LaRossa's decision not to call Blumenberg was well-founded. Equally meritless was the claim that LaRossa deliberately failed to cross-examine two trial witnesses, Latviss and Reilly, in a deliberate effort to help Hemlock. As to Latviss, since he had failed to identify Hoffer as ever having been in FNCB's Nassau office, counsel would have been foolhardy to have cross-examined him about the details of Hoffer's connections to the various accounts. (Appeal App. 632a). As to Reilly, even though she had identified Hoffer as present in FNCB's Nassau office, she did not recall any of the details as to the various accounts which had been opened. (Appeal App. 704a-05a). What difference would it really have made if the jury had learned that it was Hemlock's signature and not Hoffer's that was necessary to have broken the time deposits on pay out day? Hoffer's counsel was well advised not to emphasize further Hoffer's presence on pay out day by quibbling over signatures with a witness whose direct examination had not directly linked Hoffer to any signatures.

Frank's affidavit, submitted at Hoffer's request from Lewisburg, was laced throughout with hearsay statements concerning what Hemlock and Berman had told Frank about the control exercised over Mr. LaRossa. The pertinent portion of the affidavit reads as follows:

"At or about the time of our indictment in the U.S. District Court for the Southern District of New York, in December 1972, Hemlock told me that he was going to obtain an attorney for Hoffer, so that he, Hemlock, would be able to control Hoffer. That unless this was done Hoffer would go to the U.S. Attorneys office and obtain immunity and become a Government witness. That later an attorney was obtained for Hoffer by Hemlock and Hemlock said that he had control of Hoffer through this lawyer because Hemlock was paying the lawyer. That from the time of indictment to time of trial, Hemlock told me on two or three different occasions that Hoffer's wife was advising him to go to the U.S. Attorney and tell the truth. That he, Hemlock, and the lawyer he had obtained for Hoffer had been able to dissuade Hoffer from following the advice of his wife. That during the trial Hemlock told me that Hoffer wanted to take the stand in his own defense. That Hoffer's testimony would be damaging to the other co-defendants. That Hoffer did, during this period of time tell me he wanted to testify in his own behalf and defense because he felt that he had nothing to hide. That Hemlock told me that Hoffer's lawyer, at Hemlock's insistence, prevailed upon him not to take the stand in his own defense.

That I have seen a writing given to Hoffer by Berman. That prior to the giving of this writing Berman told me that he was going to give Hoffer such a writing and told me what was to be con-

tained in said writing. He told me all of the facts and circumstances and told me that said writing was true. He told me that Hemlock had paid cash to Hoffer's attorney. He told me that Hoffer's attorney had said that Hoffer wanted to testify and would tell the truth about the case as he saw it. That Hoffer's attorney, Hemlock and Berman decided that the case would be rested without any defense. That Hoffer's attorney would convince Hoffer that the Government case was very weak and no defense was needed. Hoffer's attorney told Hemlock and Berman that if Hoffer testified he would greatly hurt his co-defendants who would all be convicted with the possible exception of Hoffer." (App. 35).

Berman's affidavit, again provided to Hoffer at Lewisburg, recited that LaRossa's fee had been paid by Hemlock, a fact never in dispute; contained a hearsay assertion that Hemlock and his attorney Drenzo had remarked, before LaRossa was brought into the case, that LaRossa could be "controlled"; and stated that at a meeting at Gasner's Restaurant, LaRossa had said that he would convince Hoffer not to put in a defense and that, if Hoffer were to testify, "the other defendants would be convicted with the possible exception of Hoffer." Berman's affidavit provides, in relevant part, as follows:

"At or about the time of our indictment in December 1972, I met with Hemlock in his office at 15 Columbus Circle, New York. Present were John McGillicuddy, Michael Drenzo, Hemlock and myself. We discussed obtaining an attorney for Harry Hoffer. Drenzo suggested James LaRossa. Drenzo and Hemlock clearly made the point that LaRossa would be controlled. LaRossa was retained and a fee of \$15,000 was agreed

upon, a few days later when he came to Hemlock's office. This fee was paid by Hemlock, periodically, in cash.

During our trial in June 1973, Hemlock, McGillicuddy, Drenzo LaRossa and myself met at lunch in Gassner's Restaurant. At that time LaRossa told us that Hoffer was insisting on testifying and would tell the truth, as he saw it, about the case. It was then decided, with LaRossa approval that we would rest our case and put in no defense. LaRossa said that he would convince Hoffer that the Government case was very weak and no defense need be introduced. LaRossa stated that if Hoffer testified we would all be convicted with the possible exception of Hoffer." (App. 36).

The Government's response to all this was first to provide the Court with two letters Berman had written after he had sworn to his affidavit. In the first letter dated November 3, 1976 Berman wrote:

"I spoke to Gary last week and he mentioned to me the statements that John Frank and I gave Harry Hoffer. Neither of us meant to indicate that Harry was innocent of anything and would have been acquitted if he had been represented differently. At that time Hemlock's only concern was that Hoffer would make a deal with your office and plead guilty and then testify against us. Hemlock arranged through Mike Drenzo to get LaRossa and to convince Hoffer that he would be in a better position if he went along with us. In fact Hoffer was far more culpable than Frank and I, as he had gone to Canada, arranged for the land, then went to Nassau and arranged all the details. John and I, while willing to go along did not know of the details themselves until Hoffer

had arranged them. Hoffer met almost weekly with Mrs. Dominguez as he was advising her regarding her tax situation and he indicated to her that the land investment would be a tax boon for her.

At the time of the trial, Hemlock was concerned that Hoffer would fold up, and then testify for you. He was able to convince LaRossa to go along with the case until such time as your case was finished.

When you rested the government's case, LaRossa, Bender and my attorney [McGillicuddy] were convinced that there would not be any conviction, thus no defense was put in. We had a fairly heavy defense planned and then it was scrapped, as the three attorneys felt that enough reasonable doubt existed to insure at least a hung jury. No expert had testified as to the actual value of the land and we had one ready to go. I think that at the time of the deliberations even you were not sure that a conviction was going to come out of the jury room.

John and I felt that Harry was going to use the statements as mitigation for the Bar association. I think that after serving only about 8 months and getting only a suspension from the bar he came out pretty well, all things considered. He was paid \$25,000 at the time of the land deal and in addition got a law partnership from Hemlock which is still paying him plenty. All in all, he received more than any of us.

While it is true that LaRossa was hired by Hemlock and paid by the three of us, he did state that if he felt that the case was going badly, he would place Hoffer on the stand to mitigate his own position."

In his second letter to the Assistant United States Attorney, dated November 4, 1976, Berman stated:

"Both John and I are writing Naden [Hoffer's present attorney] to tell him that we cannot aid him, as anything that we could state would merely be hearsay, and be repeating what Hemlock told us. In addition, his client was at least as culpable as we were and more, since he actually carried out all the mechanics of the deal."

As an aid in assessing the sufficiency of Hoffer's claim that LaRossa had improperly kept Hoffer off of the witness stand, the Government submitted affidavits from LaRossa as well as the two attorneys, Direnzo and McGillicuddy, who Berman had said were present at the luncheon meeting. All three denied that any such conversation occurred. In this regard, the District Court's opinion recited that:

"The affidavit of Mr. LaRossa on this application states that he was retained by Harry Hoffer; that at no time did he have a conversation with Alfred Hemlock involving the issue of keeping Mr. Hoffer off the witness stand because his testimony would be beneficial to the government's case; that at no time did he have a conversation with Mr. Hemlock, Mr. McGillicuddy, Mr. Direnzo or the defendant Stephen Berman with respect to the issue of Mr. Hoffer's testimony and the repercussions of his testimony to the other defendants; and that at no time did he have any conversation with Mr. Hemlock and Mr. Direnzo with respect to keeping Hoffer in line and keeping him from cooperating with the Government.

John M. McGillicuddy, Esq. was shown the affidavit of Stephen Berman dated June 3rd, 1976 and has supplied the following affidavit:

'With respect to paragraph 2 of said affidavit wherein it is stated that a conversation was had regarding securing an attorney for Harry Hoffer that could be controlled, the statement is false.

With respect to paragraph 3 of said affidavit wherein it is stated that Harry Hoffer was prevented from testifying for the reasons therein assigned, the statement is false.'

Michael P. Direnzo, Esq. was also shown the affidavit of Stephen Berman sworn to June 3rd, 1976. His affidavit hereon states that upon being asked for the name of a competent trial attorney versed in criminal law he suggested and recommended James LaRossa, Esq. He states further that 'There was absolutely no mention, directly or indirectly, that Mr. LaRossa could or would be controlled.'

Referring to the luncheon at Gasner's Restaurant Mr. Direnzo states that 'there was no mention by Mr. LaRossa that if Mr. Hoffer testified all defendants would be convicted with the possible exception of Hoffer.' That, 'There were no discussions among Mr. Hemlock, Mr. LaRossa, and myself where the subject was 'keeping Hoffer in line and keeping him from cooperating with the government'. I did, however, have an occasion to state that I thought Mr. Hoffer would be a poor witness'." (App. 323-24).

In addition, and for the same proper purpose, the District Court received material portions of Hoffer's and LaRossa's testimony during Hoffer's disciplinary proceedings relating to their conversations about whether or not Hoffer should have testified. LaRossa testified to a

number of reasons for his advice that Hoffer not take the stand in his own defense. The pertinent portion of LaRossa's testimony was as follows:

"The first is I had very serious doubts about whether his implication within the conspiracy had been proved to a legal satisfaction.

In addition to that, I believed that even if the judge did send the case to the jury, the jury would have difficulty in believing the testimony of the complainant.

The third reason is that Mr. Hoffer was, in my opinion, a nervous individual, and based upon his nervousness, I did not think that he would be presented to a jury in as good a fashion as he did when he was having a conversation with two or three individuals." (App. 318-19).

At the hearings, Hoffer confirmed that LaRossa told him that he should not take the stand because the Government had not proven its case. (App. 319).

Hoffer now concedes (Br. at 16) that Judge Pollack correctly determined that the fact that co-defendant Hemlock paid LaRossa's fee would not be sufficient to establish a claim of ineffective assistance of counsel. This concession is well founded, since no claim has been, or could be, raised that Hoffer was unaware of the fee arrangements and did not specifically acquiesce in them. In that circumstance, no impropriety arises, as Judge Pollack found (App. 332), from the fact that one defendant paid the legal fees of another. See ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function (App. Draft 1971), § 3.5(c); cf. ABA Code of Professional Responsibility, DR 5-107(A)(1). See also *United States v. Wisniew-*

ski, 478 F.2d 274, 281-85 (2d Cir. 1973); *cf. United States v. Armedo-Sarmiento*, 524 F.2d 591, 592 (2d Cir. 1975).

The essence of Hoffer's claim on appeal thus narrows to one that Judge Pollack erroneously concluded that Frank's and Berman's affidavits contained inadequate evidentiary support for his claim that LaRossa had betrayed Hoffer's best interests by advising him not to take the stand in his own defense. This claim is meritless.

The Frank affidavit was properly disregarded by the District Court, since as Judge Pollack found "[t]he Frank affidavit is no more than a recitation of hearsay attributed to Hemlock and Berman." Hoffer's reply to this is that selected passages of the Frank affidavit do "not sound like hearsay at all." (Br. at 17). While it is a little difficult to grapple with a legal argument of this sort, since it is abundantly clear that the quoted passage *is* hearsay, see Fed. R. Evid. 801(c), Hoffer, apparently recognizing the weakness of this argument, proposes, in a footnote, a number of possible exceptions to the hearsay rule which would permit admission of Frank's sworn statement. (Br. at 17 n.10).

Hoffer first suggests that Frank's recitation of what Hemlock told him should be admitted because Hemlock was a co-conspirator in an attempt to control Hoffer's defense. The deficiency in this argument is that the prerequisite to utilization of the co-conspirator exception is independent non-hearsay evidence demonstrating (i) that a conspiracy existed and (ii) that LaRossa was a member of it. See, *e.g., United States v. Stanchich*, Dkt. No. 76-1407, slip op. 1277, 1283-85 (2d Cir., Jan. 6, 1977); *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). Independent proof is clearly lacking here.

Hoffer also opines that Frank's statements are admissible under the catch-all exceptions provided in the Federal Rules of Evidence, Rules 803(24) and 804(5). Plainly, Judge Pollack did not believe that the "interests of justice" would be served, as those Rules require, before statements are admitted pursuant to these catch-all exceptions.

Once Frank's affidavit is appropriately discounted, Hoffer's remaining claim is that Berman's affidavit established LaRossa's betrayal of Hoffer's best interests. Judge Pollack correctly found that Berman's affidavit demonstrated nothing of the sort. The non-hearsay portion of Berman's affidavit states that he was present at a joint strategy session during the trial at Gasner's Restaurant with McGillicuddy, Direnzo, LaRossa and Hemlock. He heard LaRossa tell the group that Hoffer wanted to testify. It was then decided that the defendants would rest and not put in a defense. According to Berman, LaRossa then said (1) that he would convince Hoffer that the Government's case was weak and that a defense need not be introduced, and (2) that, if Hoffer testified, "we would all be convicted with the possible exception of Hoffer."

Taking Berman's affidavit at face value, it does not establish that LaRossa was in any way engaged in an effort to undercut Hoffer's interests. Because LaRossa might have believed that Hoffer's testimony would damage his co-defendants and result in their conviction does not remotely establish that LaRossa believed that Hoffer would be more likely to avoid conviction if he testified. LaRossa could well have believed that Hoffer had a better chance of being acquitted if he did not take the stand and that the incidental effect of Hoffer's not testifying would be beneficial to his co-defendants.

Thus, on its face, the Berman affidavit provides no support (other than surmise) for Hoffer's claim. But, in addition, Judge Pollack was entitled to, and did, take

into consideration additional evidence that undercut any suggestion of impropriety contained in Berman's sworn statement. First, Judge Pollack took into account the record of the trial at which he presided, demonstrating that LaRossa, a well-known and respected practitioner, had vigorously protected his client's interests:

"Any suggestion of an omission to defend Hoffer's interests is forcefully negated by the record which shows his trial counsel's aggressive, incisive and very competent and thorough cross-examinations of the government's witnesses. It was largely due to the leading role that LaRossa took in attacking the government's case that caused the defendants and their counsel to be of the view that the government's case had been weakened to the point of justifying the hope and expectation by them of a verdict for defendants, without more. Nothing was left unexplored that had any material bearing. Hoffer was effectively represented and his right to counsel was not undermined or impaired at trial." (*United States v. Hoffer, supra*, 423 F. Supp. at 818; App. 332-33).

Secondly, in assessing the force of Berman's sworn statements, Judge Pollack properly considered the "illuminating" letters Berman sent to the Assistant United States Attorney after he had provided Hoffer with his affidavit. Most significant was the following statement in the November 3 letter:

"While it is true that LaRossa was hired by Hemlock and paid by the three of us, he did state that if he felt that the case was going badly, he would place Hoffer on the stand to mitigate his own position." (App. 93).

So much for the claim that Berman's affidavit should be interpreted as an assertion that LaRossa was prepared to betray his client.

Hoffer's response to all this is that Berman's letter should not have been considered by Judge Pollack (although he tries to have it every which way in his brief by selectively relying on those portions of Berman's letters which he claims support his position).^{*} On the contrary, these letters were properly considered by Judge Pollack as shedding light on the sufficiency of Berman's initial affidavit. Cf. *United States v. Franzese*, *supra*, 525 F.2d at 30-31; *Dalli v. United States*, *supra*, 491 F.2d at 762 n.4; cf. *United States v. Troche*, 213 F.2d 401, 403 (2d Cir. 1954). Moreover, Judge Pollack did not, as Hoffer intimates, rely on the affidavits of LaRossa, Direnzo and McGillicuddy to make an impermissible finding that Berman's affidavit was false. Compare *Taylor v. United States*, *supra*, 487 F.2d 307 (2d Cir. 1973). He simply utilized those affidavits, together with the trial record and Berman's later letters, to assess the sufficiency of Berman's affidavit.

In sum, the District Court was plainly correct in refusing to convene a hearing on the strength of the Berman affidavit.^{**}

^{*} Even cursory examination of the portions of the letters on which Hoffer purports to rely demonstrates that they do not support his contention that LaRossa's loyalties to his client were corrupted.

^{**} Hoffer, through a tortured reading of *De Coster v. United States*, 487 F.2d 1197 (D.C. Cir. 1973), argues that the burden of proving that he received effective assistance of counsel shifted to the government upon his production of Berman's affidavit. It suffices to note that *De Coster* requires the usual demonstration by the defendant that a "substantial violation" of specified requirements has occurred before this burden shifts. Here, Hoffer has not even begun to demonstrate a "substantial violation."

POINT II**The District Judge Correctly Concluded That The Bahamian Bank Evidence Was Not Newly Discovered and That It Would Not Have Produced a Different Verdict.**

Hoffer argues that based on an acknowledgement from the Bahamian branch of the First National City Bank that Hoffer lacked signature authority over the time-deposit accounts in which the fruits of the fraud were finally deposited and withdrawn, he is entitled to a new trial. On the contrary, Judge Pollack was clearly correct in finding that the record compelled the conclusion that this evidence was neither newly discovered nor would have affected the verdict.

After his trial, Hoffer obtained a document from the FNBC Bahama branch indicating that Hoffer did not have signatory control over the two time-deposit accounts in which the funds bilked from Mrs. Dominguez were finally deposited and withdrawn. Hoffer's contention that this is newly discovered evidence is absurd.

Hoffer's own affidavit states that he discussed this matter with his attorney prior to trial. (App. 27). Based on this admission and other evidence in the record, the District Court concluded:

"The evidence of those who were signatories for withdrawals from the Nassau accounts was not a discovery or revelation to Hoffer—he knew this a'l along because he had made the arrangements." (*United States v. Hoffer*, 423 F. Supp. at 817; App. 331).

The District Court's conclusion that this evidence should not be treated as newly discovered evidence is buttressed by the fact that the defendants, including Hoffer,

opposed the Government's efforts prior to and during the trial to obtain the Bahamian bank records. (Government Appeal App. 45b). This effort was plainly a strategic ploy which should now foreclose Hoffer's arguments that the bank records should occasion a new trial.* See *United States v. Tramunti*, 500 F.2d 1334, 1349 (2d Cir. 1974); *United States v. Ruggiero*, 472 F.2d 599, 604-05 (2d Cir.), cert. denied, 412 U.S. 939 (1973); *United States v. Brawer*, 367 F. Supp. 156, 174 (S.D.N.Y. 1973), aff'd, 496 F.2d 703 (2d Cir. 1974).

Hoffer's new trial motion must, therefore, fail because the evidence was not newly discovered after trial:

"a defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States v. Stofsky*, 527 F.2d 237, 244 (2d Cir. 1975), quoting from *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), cert. denied, 357 U.S. 937 (1958).

Hoffer also mistakenly claims both that this "newly discovered" evidence (i) refuted the most damaging evidence against him at trial and (ii) that this evidence now demonstrates that two Government witnesses inadvertently testified falsely at trial.

* Hoffer's interest in blocking the Government's efforts to obtain the bank documents plainly arose from the fact that the bank records would reflect that Hoffer had actually opened checking accounts for the Columbia and Splindian shell corporations into which he deposited \$1.14 million. (App. 329-30). The records would have also reflected that Hoffer alone disbursed an aggregate of \$745,000 from those two accounts into the five time-deposit accounts from which the monies were ultimately withdrawn. The records might well, too, have reflected Hoffer's presence on the day when the funds were withdrawn from those five accounts.

The premise for each of these two claims is Hoffer's incorrect equation of the telegram showing that he had no signatory power over the five time-deposit accounts with proof that he was not present on the day when his co-defendants executed their signatory power, withdrew the money and walked out of the bank with him. The telegram quite obviously proves no such thing.* As Judge Pollack found this "newly discovered" evidence was insignificant:

* The two Bahamian Bank employee witnesses, Latvis and Reilly, never testified that Hoffer had signatory control over the five time-deposit accounts from which the funds were ultimately withdrawn. Latvis simply testified that Hoffer was a principal in the corporations which opened the time-deposit accounts, and, since Hoffer was the Assistant Secretary of both corporations, this fact can hardly be disputed. Reilly testified that Hoffer opened some unspecified accounts for the two corporations and signed signature cards, and this, too, was accurate, since Hoffer now concedes that he had sole control over the two corporate checking accounts into which the \$1.14 million was originally deposited. (App. 329-30).

The Government never argued to the jury that Hoffer had signatory control over the time-deposit accounts, but simply and correctly, that Hoffer had signatory control over *two accounts*—one for each corporation—without specifying whether these were time-deposit checking accounts. (Appeal App. 853). Moreover, the Government did not argue to the jury that Hoffer had signed anything on the day the monies were withdrawn from the time-deposit accounts. Indeed, the summations of all counsel were silent as to the events on the day the money was withdrawn.

Because Hoffer is unable to find anything false in Latvis' and Reilly's testimony and can point to no incorrect argument made to the jury, he focuses his attack only on the Government's brief on appeal. (Br. at 33). The only statement in that brief which has now been shown to be inaccurate is that

"Hoffer's signature was necessary to . . . withdraw the funds from the two Bahamian time-deposit account. . . ." (Gov't Br. at 25).

Obviously, if the Government drew what is only now perceived to be an overly broad inference (but a fair one based on the record as it existed at trial), that does not render the trial testimony in any way false.

"The actual bank record would not have produced a different verdict; there were too many other steps that Hoffer was involved in for him to convince the jury to acquit him. His testimony that he was merely an unknowing dupe for the scheme of the other three would have collided with too much to be explained, at every step in the course of executing the transactions, to expect a jury to accept such a story from the law office associate assigned to the tasks by Hemlock, euphemistically denominated as the 'mechanic on a real estate transaction.' The additional evidence from the bank concerning the accounts and who was authorized and withdrew funds therefrom would have been most inconsequential under the facts and circumstances in the record." (*United States v. Hoffer*, 423 F. Supp. at 817; App. 331).

Here, again, this finding by the judge who was most intimately familiar with the trial record is amply supported, and, indeed, is virtually compelled when it is recalled that the heart of the case against Hoffer was his ringing silence in the face of Mrs. Dominguez' questions concerning the land transactions—silence about every detail, suspicious, innocuous or otherwise. Repeatedly, at the 1968 series of summer meetings, Hoffer's only response to Mrs. Dominguez' questions was the echo of her inquiries. Indeed, Hoffer has still failed to supply any justification for his repeated deceptions in the face of Mrs. Dominguez' questions, even though Judge Friendly made clear that this evidence made Hoffer's "claim of innocence highly implausible." *United States v. Frank*, *supra*, 494 F.2d at 153.

In sum, Hoffer's motion simply did not reveal "omitted evidence [which] creates a reasonable doubt that did not otherwise exist." *United States v. Agurs*, 44 U.S.

L.W. 5013, 5017 (June 24, 1976). Nothing Hoffer has produced under the rubric of "newly discovered evidence," as Judge Pollack found, "would have produced a different verdict." And after all is said and done, what was shown was "most inconsequential under the facts and circumstances in the record." (*United States v. Hoffer, supra*, 423 F. Supp. at 817; App. 331).

CONCLUSION

The denial of Hoffer's new trial motion should be affirmed.


Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

W. CULLEN MACDONALD,
LAWRENCE B. PEDOWITZ,
*Assistant United States Attorneys,
Of Counsel.*

W. CULLEN MACDONALD, being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District of
New York.

RALPH S. NADEN, ESQ.
253 Broadway, Rm. 850
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W.CULLEN MACDONALD
Assistant United States Attorney

28th day of February, 1977

ALMA HANSON
NOTARY PUBLIC, State of New York
 No. 24-6763450 Qualified in Kings Co.
 Commission Expires March 30, 1978